ARAB MALAYSIAN FINANCE BERHAD

v.

BADIADDIN MOHAMMAD MAHIDIN & ANOR.

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD MOHD. ISMAIL JCA
N.H. CHAN JCA
ABU MANSOR ALI JCA
[CIVIL APPEAL NO: N-02-679 OF 1995]
24 JANUARY 1996

CIVIL PROCEDURE: *Judgments and Orders - Setting aside - High Court - Whether could set aside its own final order - Whether could set aside a final order of another High Court - Whether already functus officio - Power to alter or set aside order regularly obtained - The "slip rule" principles - Rules of the High Court 1980, O. 20 r. 11.*

The respondents were the registered owners of some 11 acres of land held under Malay Reservation. The land was at the material time mortgaged to the appellant. The respondents applied for a declaration that the mortgage was invalid by virtue of s. 7 Malay Reservation Enactment FMS Cap. 42, and on 21 March 1988 the Seremban High Court (presided by Mustapha Hussain J) ordered that the mortgage was invalid and that the respondents must return all monies received to the appellant. Following the order, the appellant applied for the sale of the land, and following that, on 8 October 1990, Mustapha Hussain J. made an order *inter alia* that "the land be sold by public auction or private treaty". The respondents appealed to the Supreme Court against the latter order, but the appeal was struck off for want of leave to appeal. Following the striking off, the respondents did not, however, file a fresh application for leave as expected, but proceeded instead to file a fresh Summons-in-Chambers in Seremban High Court, seeking to declare invalid the said order of 8 October 1990. On 22 September 1995 Mohd Noor Abdullah J, who presided over Seremban High Court, allowed the application and accordingly set aside the order. The appellant appealed, and the question that arose was whether the order of 8 October 1990 herein had been properly set aside, and hence, whether the order of 22 September 1995 was valid or invalid.

Held:

Per Shaik Daud Mohd. Ismail JCA (delivering the judgment of the Court):

[1] The proper course for the respondents to adopt, if they find themselves unhappy with the order of 8 October 1990, would be to appeal to the then Supreme Court, as at that time that was the only Court that could declare as being invalid or otherwise any order of the High Court.

[2] Although the appellant did appeal to the Supreme Court, since their appeal was struck off and not dismissed, the proper course then would be for them to make a fresh application for leave with all consequential orders. This the respondents failed to do, as they instead applied by Summons-in-Chambers for the Seremban High Court to set aside its own order.

[3] It is settled law that one High Court cannot set aside a final order of another High Court, let alone its own final order. In the circumstances, the Seremban High Court having rightly or wrongly given the order of 8 October 1990, is *functus officio*, and it cannot set its own order aside.

[4] Clearly, the order of 8 October 1990 is a final order of the Seremban High Court. Therefore that order cannot be altered, varied or set aside by the same Court even though presided over by another Judge. The order also does not come under the slip rule in O. 20 r. 11 of the Rules of the High Court 1980. This being the case, the only recourse is to appeal to a higher Court which has jurisdiction to pronounce the validity or otherwise of the 8 October 1990 order. The learned Judge below, therefore, should not have entertained the respondent's application.

[Appeal allowed]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Penghakiman dan perintah - Pengenepian - Mahkamah Tinggi - Samada boleh mengenepikan perintah muktamadnya sendiri - Samada boleh mengenepikan perintah muktamad Mahkamah Tinggi yang lain - Samada telah functus officio - Kuasa untuk mengubah atau mengenepikan perintah yang diperolehi secara teratur - Prinsip "slip rule" - Kaedah-kaedah Mahkamah Tinggi 1980, A. 20 k. 11.*

Responden-responden merupakan tuanpunya berdaftar bagi lebih kurang 11 ekar tanah di bawah pegangan Rizab Melayu. Tanah tersebut adalah pada waktu yang material itu digadai-janjikan kepada perayu. Responden-responden telah memohon untuk satu pengisytiharan bahawa gadai-janji tersebut adalah tak sah menurut s. 7 Enakmen Rizab Melayu FMS Cap. 42, dan pada 21 Mac 1988, Mahkamah Tinggi Seremban (disidangi oleh Mustapha Hussain H) memerintahkan bahawa gadai-janji tersebut adalah tak sah dan bahawa responden-responden haruslah mengembalikan semula kesemua wang yang telah diterima kepada perayu. Berikutan dengan perintah itu, perayu telah memohon untuk menjual tanah tersebut, dan berikutan itu, iaitu pada 8 Oktober 1990, Mustapha Hussain H. membuat perintah, antara lainnya, bahawa "tanah tersebut hendaklah dijual melalui perlelongan awam atau triti persendirian". Responden-responden telah merayu kepada Mahkamah Agung terhadap perintah yang terkemudian, tetapi rayuan tersebut telah dibatalkan kerana ketiadaan kebenaran untuk merayu. Berikutan dengan pembatalan tersebut, responden-responden,

bagaimanapun, tidak memfailkan permohonan baru untuk mendapatkan kebenaran sepertimana yang dijangkakan, tetapi sebaliknya telah memfailkan satu Saman dalam Kamar yang baru dalam Mahkamah Tinggi Seremban, memohon untuk mengisytiharkan perintah bertarikh 8 Oktober 1990 itu sebagai tak sah. Pada 22 September 1995, Mohd Noor Abdullah H., sewaktu bersidang di Mahkamah Tinggi Seremban, telah membenarkan permohonan responden dan berikutan itu telah mengenepikan perintah berkenaan. Perayu merayu dan persoalan yang berbangkit adalah samada perintah bertarikh 8 Oktober 1990 di sini telah diketepikan dengan wajarnya, dan oleh itu, samada perintah bertarikh 22 September 1995 di atas sah ataupun sebaliknya.

Diputuskan:

Oleh Shaik Daud Mohd. Ismail HMR (menyampaikan penghakiman Mahkamah):

[1] Jalan betul yang harus diterimapakai oleh responden-responden, jika mereka berasa tidak puashati dengan perintah bertarikh 8 Oktober 1990, adalah untuk merayu kepada Mahkamah Agung ketika itu, kerana pada waktu itu, Mahkamah Agunglah yang merupakan satu-satunya Mahkamah yang boleh mengisytiharkan mana-mana perintah Mahkamah Tinggi sebagai tak sah ataupun sebaliknya.

[2] Walaupun perayu telah membuat rayuan kepada Mahkamah Agung, oleh kerana rayuan mereka telah dibatalkan dan bukannya ditolak, jalan yang betul ketika itu bagi mereka ialah untuk membuat satu permohonan baru bagi mendapatkan kebenaran dan kesemua perintah-perintah yang berbangkit. Responden gagal melakukan perkara ini, di mana mereka sebaliknya telah memohon melalui Saman dalam Kamar untuk Mahkamah Tinggi Seremban mengenepikan perintahnya sendiri.

[3] Ianya adalah undang-undang yang telah lama diamalkan bahawa sebuah Mahkamah Tinggi tidak boleh mengenepikan suatu perintah muktamad sebuah Mahkamah Tinggi yang lain, sementelah pula perintah muktamadnya sendiri. Dalam keadaan sedemikian, Mahkamah Tinggi Seremban, setelah dengan betulnya ataupun dengan salahnya memberikan perintah bertarikh 8 Oktober 1990, adalah *functus officio,* dan ianya tidak boleh mengenepikan perintahnya sendiri.

[4] Jelas bahawa, perintah bertarikh 8 Oktober 1990 itu adalah perintah muktamad Mahkamah Tinggi Seremban. Dengan itu, perintah itu tidak boleh diubah, ditukar atau diketepikan oleh Mahkamah yang sama walaupun didengar oleh seorang Hakim yang lain. Dan perintah itu juga tidak terlingkung di bawah kaedah khilaf dalam A. 20 k. 11 Kaedah-kaedah Mahkamah Tinggi 1980. Oleh itu, satu-satunya cara pemulihan adalah untuk

merayu kepada sebuah Mahkamah yang lebih tinggi yang mempunyai bidangkuasa untuk mengumumkan keesahan atau sebaliknya akan perintah 8 Oktober 1990 tersebut. Hakim yang bijaksana di bawah dengan itu tidak seharusnya melayan permohonan responden.

[Rayuan dibenarkan]

Cases referred to:
Hock Hua Bank Bhd. v. Sahari bin Munid [1981] 1 MLJ 143 ***(foll)***

Legislation referred to:
Malay Reservation Enactment FMS Cap. 142, s. 7
Rules of the High Court 1980, O. 20 r. 11

For the appellant - J.W. Appukuttan; M/s. Wang Kuo Shing & Co.
For the respondent - V. Ganesalingam; M/s. Krishna & Assoc

JUDGMENT

Shaik Daud Mohd. Ismail JCA:

This appeal arises from the decision of the Seremban High Court given on 22 September 1995 wherein the learned Judge, *inter alia,* set aside that part of an earlier order dated 8 October 1990 handed down by the same Court which ordered that the land held under tittle No. EMR 315, Lot 342 Mukim Repah Tampin, Negeri Sembilan (the land) be sold by public auction and/or private treaty.

The facts of the case are that the respondents are registered owners of some 11 acres of land held under Malay Reservation. They entered into a joint venture agreement with one Ismail b. Omar to develop the land into a housing scheme. In order to get funds for the scheme Ismail b. Omar applied for and obtained a loan of RM400,000 from the appellant. The loan was granted and as security for the loan the land was mortgaged to the appellant. Unfortunately the appellant was not competent to hold the mortgage over the land as it is not considered to be a Malay or a Malay holding. Under s. 7 of the Malay Reservation Enactment FMS Cap 142 only a Malay or gazetted Malay holding is capable of holding Malay Reservation land. Unfortunately also the joint venture failed and Ismail b. Omar ended up owing the appellant to the tune of some RM300,000. Accordingly the appellant commenced proceedings against Ismail bin Omar for the recovery of the money owed.

The respondents in the meantime applied for a declaration that the mortgage held by appellant was invalid by virtue of s. 7 of the Malay Reservation Enactment FMS Cap 142. On 21 March 1988 the Seremban High Court Judge, the late Mustapha Hussain heard the respondent's application and made the following orders:

(1) the mortgage was invalid;

(2) the order by the Land Administrator Tampin given to the appellant for the sale of the land was also invalid;

(3) the Land Administrator is ordered to cancell the entry of the mortgage;

(4) the applicants (now the respondents) shall return all monies delivered them by appellant;

(5) the applicants are prohibited from dealing with the land as long as the loan remains unpaid;

(6) either party be at liberty to apply in order to execute the above orders.

Following this order appellant, by Summons in Chambers dated 4 May 1988 applied for the sale of the land either by public auction or private treaty with a view to repay the loan including interest. On 8 October 1990 the late Mustapha Hussain J (as he then was) again made the following orders:

(1) a declaration that the respondents had in fact received the loan or the facility from the appellant;

(2) the respondents jointly and/or severally repay the appellant a sum of RM300,000 together with interest thereon and alternatively;

(3) the land be sold by public auction or private treaty; and

(4) the proceeds of sale to be utilised to pay the RM300,000 with interest.

It would appear that the respondents were unhappy with the 8 October 1990 order and rightly filed an appeal to the then Supreme Court. The appeal, however, was struck off on the ground that no leave to appeal had been obtained beforehand. Instead of making a fresh application for leave with all consequential orders, some seven months later the respondents commenced afresh by a Summons in Chambers dated 9 March 1995 in Seremban High Court, the same Court which gave the 8 October 1990 order *albiet* now being presided by a different Judge, for a declaration that that part of the 8 October 1990 order was invalid. The part they seek to be declared invalid is the alternative order of sale by either public auction or private treaty. The latest Summons in Chambers was in fact heard on 22 September 1995 before Dato' Mohd. Noor b. Hj. Abdullah J, who at that date presided over Seremban High Court. The learned Judge allowed the application and accordingly set aside that part of the order given on 8 October 1990.

Let us pause at this point to say that without going into the merits of the 8 October 1990 order, we would have thought that the proper course for the

respondents to adopt, if they find themselves unhappy with that order, would be to appeal to the then Supreme Court, as at that time that was the only Court that could declare as being invalid or otherwise any order of the High Court. As mentioned earlier they in fact did appeal to the then Supreme Court but their appeal was struck off since they failed to obtain leave to appeal beforehand. Since their appeal was only struck off and not dismissed, the proper course then would be to have made a fresh application for leave with all consequential orders. Instead the respondents applied by Summons in Chambers praying for the Seremban High Court to set aside its own order. It is settled law that one High Court cannot set aside a final order of another High Court, let alone its own final order. It is our view that the Seremban High Court having rightly or wrongly given the 8 October 1990 order, is *functus officio*, and it cannot set its own order aside. In *Hock Hua Bank Bhd. v. Sahari bin Munid* [1981] 1 MLJ 143, the learned Judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. There was no appeal against that order. The respondent applied to set aside the judgement which at first was refused but on a second application it was allowed. On appeal the then Federal Court held that the learned Judge was *functus officio*. At p. 144 of the judgment Chang Min Tat FJ (as he then was) who delivered the judgment held:

> Clearly the Court has no power under any application in the same action to alter vary or set aside a judgement regularly obtained after it is drawn up, except under the slip rule in order r. 11 Rules of the Supreme Court 1957 (O. 20 r. 11 Rules of the High Court 1980) so far as necessary to correct errors in expressing the intention of the Court.

Clearly the order of 8 October 1990 is a final order of the Seremban High Court. Therefore that order cannot be altered, varied or set aside by the same Court even though presided over by another Judge. Nor does it come under the provision of O. 20 r. 11 of the Rules of the High Court 1980. The only recourse is to appeal to a higher Court which has jurisdiction to pronounce the validity or otherwise of 8 October 1990 order. Therefore we feel that with respect Dato' Mohd. Noor. b. Haji Abdullah J ought not to have entertained the respondent's application. The order given on 22 September 1995 is, to our mind invalid and ought to be set aside. We would therefore allow the appeal with costs, and the deposit to be refunded.

N.H. Chan JCA:

I agree that the appeal should be allowed.

Reported by W.A. Sharif